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No. 164

In the Supreme Court of the United States

OCTOBER TERM, 1929

PIEDMONT & NORTHERN RAILWAY COMPANY AND NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS, APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND SOUTHERN RAILWAY COMPANY ET AL., APPELLEES

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

DANIEL W. KNOWLTON,
For Interstate Commerce Commission.

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In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 164

PIEDMONT & NORTHERN RAILWAY COMPANY AND National Association of Railroad and Utilities Commissioners, appellants

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE Commission, and Southern Railway Company et al., appellees

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

OPINIONS

The opinion of the specially constituted District Court (Circuit Judges Waddill and Northcott and District Judge Soper is reported in *Piedmont & Northern Ry. Co.* v. *United States et al.*, 30 F. (2d) 421 (R. 222.)

The Commission's report herein involved, *Proposed Construction of Lines by Piedmont & Northern Railway Company,* 138 I. C. C. 363, will be found at pages 29–81 of the record.

QUESTIONS

The Commission proceeding was instituted by application filed by the Piedmont & Northern under paragraphs (18) to (21) of section 1 of the Interstate Commerce Act asking authority to undertake certain extensions of its lines. The application was made with the understanding that the Piedmont & Northern reserved the right to contend that it was an interurban electric railway, not operated as part of a general steam system, within the meaning of paragraph (22) of section 1, which excludes such railways along with street and suburban electric railways from Commission authority over construction of new lines of railroad, and, after filing its application, the Piedmont & Northern moved to dismiss on that ground. The Commission, in its report, held that the Piedmont & Northern was not an interurban electric railway within the meaning of the exception to its jurisdiction contained in paragraph (22), and denied the application. Thereafter the Piedmont & Northern instituted this suit under the Urgent Deficiencies Act of October 22, 1913 (38 Stat. 219, U. S. C., Title 28, Sec. 47), asking in substance that the Commission's order, taking jurisdiction of its said application and

denying the same, be set aside and annulled. (R. 11.) In addition to filing answers to the petition, the United States and the Commission moved to dismiss on the grounds that the court was without jurisdiction to entertain the petition. (R. 97, 98, 101.) The lower court assumed jurisdiction and its decree, dismissing the petition of the Piedmont & Northern was based upon the merits.

The questions in issue before this Court are:

1. Did the lower court have jurisdiction to review the question of Commission authority over the extensions of lines proposed by the petitioner in a suit to enjoin an order, which denied the administrative relief prayed for?

2. Do the facts that the Piedmont & Northern operates between cities with electric locomotives and that a minor part of its service has characteristics peculiar to local electric railways make it an interurban electric railway within the meaning of the clause which excludes interurban electric railways not operated as part of a general steam system from Commission authority over the construction of new lines of railroad, despite the further facts that its major operations are identical with the steam roads, that 92 per cent of its revenues are derived from transportation of freight, and that 95 per cent of said freight is carload traffic, mostly interchanged with the steam roads and mostly moving interstate?

STATUTES

The provisions of the Interstate Commerce Act herein particularly involved are contained in paragraphs (18) to (22), inclusive, of section 1, and read as follows:

> (18) After ninety days after this paragraph takes effect no carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this Act over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment.
>
> (19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this Act shall apply to all such proceedings.

Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate, and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of

this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

(21) The Commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this Act, party to such proceeding, to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term is used in this Act, and to extend its line or lines: *Provided,* That no such authorization or order shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier subject to this Act which refuses or neglects to comply with any order of the

Commission made in pursuance of this paragraph shall be liable to a penalty of $100 for each day during which such refusal or neglect continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

(22) The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation.

STATEMENT

Appellant, Piedmont & Northern, owns an electrically operated railroad, one segment of which extends from Greenwood, S. C., to Spartanburg, S. C., 88.9 miles, with a branch from Belton to Anderson, S. C., 11.3 miles, and another segment of which extends from Gastonia, N. C., to Charlotte, N. C., 23.5 miles, with a branch from Belmont Junction to Belmont, 3.2 miles. (R. 2, 36.) It connects with other railroads at the termini of both segments and is now engaged in interstate transportation, much the larger part whereof is freight, as a participating carrier in through routes and joint rates under filed and published tariffs. (R. 37, 38.) In the Commission proceeding it sought authority, under paragraphs (18) to (21) of section 1 of the

Interstate Commerce Act, to build two extensions of 53 and 75 miles, the first connecting Spartanburg, the northern terminus of the South Carolina segment, with Gastonia, the southern terminus of the North Carolina segment, and the other extending from Charlotte, the northern terminus of the North Carolina segment, to Winston-Salem, N. C. (R. 31.) The completed line would be 256 miles in length and would extend through from Greenwood, S. C., to Winston-Salem, N. C.

The existing lines connect with the street railway systems of the cities reached, but between terminals they are located on private right of way, only 2.9 miles of the main line mileage being in streets. (R. 37.) The Piedmont & Northern owns and operates the street railway system at Gastonia, but those at Charlotte, Greenville and Anderson are owned and operated by a separate corporation, namely, the Southern Public Utilities Company. (R. 37, 140.) The new lines, as proposed, would have connected with local street railways, also owned by the Southern Public Utilities Company, and would have provided independent through tracks to move freight traffic around the cities. (R. 37, 140.)

The South Carolina line of the Piedmont & Northern now has connections with the steam roads as follows: At Greenwood, with Seaboard Air Line, Southern Railway, and Charleston & Western Carolina; at Spartanburg, with Clinchfield Railroad,

Southern Railway, and Charleston & Western Carolina; and at Anderson, with Charleston & Western Carolina. The North Carolina line connects: At Gastonia with the Southern Railway; at Charlotte with the Seaboard Air Line and the Southern Railway; and at Belmont with the Southern Railway. (R. 28, 29.) The Piedmont & Northern's line, as proposed to be extended, would connect with the Norfolk & Western and the Southern Railway at Winston-Salem and, in addition to its above-mentioned connections at Greenwood, it would connect with the Georgia & Florida Railroad, whose extension to that point was under construction at the time of the hearings. One of the purposes of the proposed construction is to form a new through route for the movement of freight between the North, East, and West and Florida points. (R. 39, 154.)

About 92 per cent of the Piedmont & Northern's revenue is derived from freight (R. 140, 147), 95 per cent whereof consists of carload traffic. (R. 190.) Of 72,886 cars handled in 1926, 68,370 were interchanged with the steam roads (R. 37, 153, 147), and with the proposed lines built, the carrier estimated that it will handle 85,000 additional cars per annum in interchange (R. 147).

The Southern Railway Company, the Atlantic Coast Line R. R. Co., the Seaboard Air Line Ry. Co., the Carolina, Clinchfield & Ohio Ry., the Louisville & Nashville R. R. Co., and the Charleston &

Western Carolina Ry. Co. intervened in the Commission proceeding in opposition to the application. (R. 30.) Their opposition was based on the grounds that the proposed extensions would be exclusively competitive, serving no territory not already adequately served by existing lines and would be particularly detrimental to their interests and their ability to continue rendering efficient service because the same interests (the so-called Duke interests) which are in control of the Piedmont & Northern likewise control many industries in the tributary territory and are closely affiliated with others, by reason whereof and the generally great influence of those interests throughout the territory the steam roads would be placed in a peculiarly disadvantageous position in attempting to hold to their lines their fair share of the traffic. (R. 60–63, 68–76.) The Georgia & Florida Railroad, whose extension to Greenwood, under construction at the time of the hearing, will form the southern part of the new through route which it is proposed to establish, intervened in support of the application. (R. 56.) The application also had the support of the Governors and Utility Commissioners of North Carolina and South Carolina and of various municipal, civil, and trade organizations and of individual shippers. (R. 31.)

After filing its application with the Commission, the Piedmont & Northern moved to dismiss on the grounds that the Commission's authority did not

extend to construction of the character contemplated, its contentions being

> (1) That the proposed lines would merely complete pursuant to original plan a railroad, the construction whereof was begun prior to passage of the amendment to the Act requiring Commission authority for the building of new lines, has been prosecuted with reasonable diligence, and has never been abandoned,[1] and
>
> (2) That the proposed lines will form part of an electric interurban railway, not to be operated as a part of a general steam railway system and, therefore, are not lines, for the building whereof the Commission's authority is required under the statute.

The motion was first argued but decision thereon was deferred until after hearing on the merits. (R. 31.) Following such hearing the Commission's report and order, which appear as an exhibit to the petition herein, were issued, holding that the Commission had jurisdiction of the application and denying the same upon the finding that the present and future public convenience and necessity were not shown to require the construction of the proposed lines of railroad. (R. 19–80.)

Following issuance of the Commission's report and order the Piedmont & Northern filed its petition asking:

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[1] The Piedmont & Northern's brief (p. 2) in this court abandons this contention.

> For a permanent injunction decreeing that the Commission was without jurisdiction of the application of petitioner, hereinbefore referred to and made a part of this petition as "Exhibit A," and that the Order of the Commission of April 3rd, 1928, taking jurisdiction of said application and denying the same, be set aside and annulled, and that the Commission be forever enjoined from taking any action or proceeding against your petitioner under said Order; and that upon the filing of this petition due proceedings shall be taken herein pursuant to the Statute and in accordance with the practice of this Court. (R. 11.)

On February 6, 1929, the lower court entered its decree denying the relief prayed for and dismissing the petition "for the reasons stated in its opinion" (R. 252). Those reasons were succinctly stated in the closing paragraph of its opinion to be that the Piedmont & Northern's

> freight traffic dominates so completely the field of its operations, and reaches so far, through interchange with other railroads, that it is outside the class which Congress intended to exclude from the control of the Commission. Even if in the beginning it was merely an interurban railroad, its essential character has so greatly changed, and its operations and interests have become so similar to those of a general steam carrier, that it is now well able to commit the mischiefs of uncontrolled expansion, which the Act was designed to prevent. (R. 251.)

In addition to their answers to the petition, the United States and Interstate Commerce Commission had, as heretofore said, moved to dismiss for lack of jurisdiction in the Court to entertain the petition on grounds, in substance, that the order of the Commission was a negative order within the meaning of decisions of this Court holding that negative orders of the Commission are not judicially reviewable. (R. 97, 98, 101.) Since the Court dismissed the petition on the merits it necessarily follows that the motions to dismiss for lack of jurisdiction were overruled.

SUMMARY

ARGUMENT THAT COMMISSION ORDER NOT JUDICIALLY REVIEWABLE

The Commission's order is a negative order within the meaning of decisions of this Court holding that the Urgent Deficiencies Act does not confer jurisdiction upon the courts to set aside, annul, suspend, or enjoin negative orders of the Commission.

ARGUMENT ON MERITS

1. The Piedmont & Northern, whose major operations are identical with those of the steam roads, whose revenues are 92 per cent derived from freight, whose said freight is 95 per cent carload traffic, mostly interchanged with the steam roads and mostly moving interstate, is not rendered an interurban electric railway within the meaning of the

clause, which excludes interurban electric railways not operated as part of a general steam system from Commission authority over the construction of new lines of railroad, merely because its motive power is electricity, because it operates between cities and because a very minor part of its service is of usual interurban electric character.

2. The words "interurban electric railway" have no settled meaning at law and, therefore, resort must be had to the context of the statute to ensure correct interpretation.

3. Under the terms of section 15a the Commission must include the Piedmont & Northern with the steam roads when adjusting rates so as to yield a fair return on aggregate group property value, and section 15a and paragraphs (18)–(22) of section 1, herein involved, are among the interrelated amendnments added by the Transportation Act, 1920, with the one objective of promoting a generally effective transportation service at lowest possible just rates, and the latter provisions, namely, those placing restrictions upon competitive and unneeded new construction, are particularly essential to the plan in order that the aggregate property value upon which rates paid by the public are to be based shall not be enlarged beyond the general transportation needs.

4. While the fact that the electric interurbans excepted from the Commission's section 15a authority to make group adjustment of rates are

limited to those not engaged in general transportation of freight shows that uniformity of freight rates was regarded to be in all cases essential, the fact that the electric interurbans excepted from the Commission's authority over new construction and over the issuance of new securities are not so limited does not show that all railroads operating between cities with electric locomotives, whatsoever their character and purpose, are to be quit of the Commission's said authority, but merely demontrates that Congress desired to leave those matters to local authority, if such railroads are principally designed for the usual local electric railway purposes, even though to some extent intended for general freight transportation; to give the difference in language a broader scope than this would frustrate the plan of Congress in important particulars and would be contrary to the rule that excepting clauses should be narrowly construed so as not to destroy the remedial processes intended to be accomplished.

5. The "dovetail" relationship of the provisions comprising the plan of Congress for an effective and coordinated general transportation system refutes the Piedmont & Northern's position that it is permissible thereunder for it to avail itself of certain provisions, enabling it to become an important link with the steam roads in the general transportation chain, while at the same time refusing to submit itself to the restrictive provisions, essential to the good of the transportation system as a whole.

6. Appellant's reasoning to the effect that Congress, by using the words "interurban electric railway" in the exception to Commission authority over the construction of new lines, showed an intention to exclude all electric railroads operating between cities from the national field of authority because railroads constituting links in the national transportation chain were already employing electric locomotives when the 1920 Act was passed is not convincing.

ARGUMENT THAT COMMISSION'S ORDER NOT JUDICIALLY REVIEWABLE

The Commission's order is a negative order within the meaning of decisions of this Court holding that the Urgent Deficiencies Act does not confer jurisdiction upon the courts to set aside, annul, suspend, or enjoin negative orders of the Commission

The Commerce Court Act (36 Stat. 539) created the Commerce Court and conferred upon it the jurisdiction theretofore possessed by the circuit courts in respect of cases arising under the Interstate Commerce Act, including "cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission." The Urgent Deficiencies Act (38 Stat. 219) abolished the Commerce Court and transferred its jurisdiction to the several District Courts of the United States. The petition in the court below purports to invoke this special jurisdiction and also the general equity jurisdiction of said court.

Section 1 (18)–(21) of the Act makes the Commission's authority a prerequisite to any extension or new construction of lines. The Piedmont & Northern applied for such authority and doubtless if the Commission had acted affirmatively thereon by granting the application its order would have been reviewable at the instance of competing railroads or others, whose interests might have suffered by the change so authorized of existing status of lines.

In the *Chicago Junction Case,* 264 U. S. 258, and in *Venner* v. *Michigan Central R. R. Co.*, 271 U. S. 127, affirmative orders under analogous provisions of the Act were held to be reviewable under the Urgent Deficiencies Act. In the one case the Commission had, after hearing, issued its certificate under section 5 (2) of the Interstate Commerce Act authorizing the railroad to acquire control of another carrier, and in the other case it had, under section 20a of said Act, authorized the railroad to issue new securities. These orders, although permissive rather than mandatory in form, were nevertheless affirmative orders authorizing change of existing status in respect of the matter involved. Similarly a rate or service order of the Commission which requires or authorizes a change in rates, service or practices is reviewable by the Courts because it is affirmative in that it makes, or permits

of, change in existing status.[2] But where, after consideration of the matter submitted, the Commission finds that no change of existing rates, service, or practices is warranted and its order, therefore, merely dismisses the complaint or denies the application, its order is negative in character and not reviewable by the courts.

In *Procter & Gamble* v. *United States,* 225 U. S. 282, the Commission, after hearing upon complaint of the Procter & Gamble Company with reference to demurrage regulations of the American Railway Association, had made a report finding that such regulations were not preferential or discriminatory, as charged, or otherwise in conflict with the Act to Regulate Commerce and had entered an order dismissing the complaint. The case was taken to the Commerce Court on petition to set aside the order of the Commission under the provisions of the Commerce Court Act which, as above said, are now embodied in the Urgent Deficiencies Act. The court found that it had jurisdiction to entertain the petition but found against the complainant on the merits. On appeal, this Court held that the lower court had improperly assumed jurisdiction because the Commission's order involved was not an affirmative order, that is to say, the Commission had not affirmatively exercised its

[2] The order in *United States* v. *New River Co.*, 265 U. S. 533, 541, although negative in form, permitted and authorized a change in existing administrative status.

administrative powers in the premises, but had left the existing status undisturbed.

The Court considered that the words of the Commerce Court Act conferring jurisdiction to enjoin, set aside, annul, or suspend any order of the Commission, when given "their natural significance" conferred "jurisdiction only to entertain complaints as to affirmative orders," (293), that is, that the Act conferred no mandatory injunctive power such as would be necessary to compel the Commission to substitute for its negative action and order in any proceeding, affirmative action and an affirmative order. In corroboration, the Court then went on to consider the context of the Commerce Court Act, particularly as interpreted in light of the fact that it was named an amendment to the Act to Regulate Commerce (295), and showed that any other view would tend to frustrate the policy of Congress to confer upon one body, to the end of uniformity, exclusive authority in respect of administrative matters. The conclusions there reached by this Court were, in substance, that the lower court had improperly taken jurisdiction, because its assumption of jurisdiction to set aside a negative order of the Commission, carried with it as a necessary corrollary, the assumption that it could grant the administrative relief denied by the Commission, thereby substituting its judgment for that of the Commission in respect of administrative matters exclusively entrusted by the Act to the Commission. (295–299.)

If it should be urged that in the instant case the lower court could have set aside the order of the Commission without passing upon administrative matters, that is, by merely reversing the conclusion of law reached by the Commission that its authority did extend to the construction of lines proposed by the Piedmont & Northern, the answer is, of course, that such situation would, to all intents and purposes, be the same in respect of any negative order. As stated in the *Procter & Gamble Case* a court's jurisdiction to review even affirmative orders of the Commission is confined to legal questions, namely, as to whether the Commission has exceeded its statutory or constitutional authority, or has exercised it arbitrarily beyond the power conferred. (298.) So that this Court, in holding that negative orders are not reviewable, has in effect said that the legal questions, as to which affirmative orders are reviewed, afford no basis for entertaining complaints against negative orders.

The reasons behind this are apparent in connection with the present case. On the one hand, the lower court's determination that the Commission had authority over the proposed lines was of no avail to the Piedmont & Northern because the court could not go further and review the administrative finding of the Commission that the lines were not desirable in the public interest. On the other hand, if the Commission had been without jurisdiction, then its order refusing authority for the extension

of lines would have been no obstacle to their being built. The risk to which the Piedmont & Northern is exposed arises, not from the order, but from the statute which prescribes penalties for undertaking, without Commission authority, new construction of a kind for which Commission authority is required by the Act.

This is shown in *Lehigh Valley R. Co.* v. *United States,* 243 U. S. 412, and the situation there presented is closely analogous to that here under consideration. In that case there was involved an order of the Commission entered under the Panama Canal Act of 1910. (Sec. 5 (9)–(11), I. C. Act; 37 Stat. 566.) That act prohibited, after July 1, 1914, any ownership by a railroad in any water carrier with which the railroad "does or may compete for traffic" and it authorized the Commission to determine questions of fact as to such competition or possibility of competition and to extend the time of ownership beyond July 1, 1914, if in its opinion any existing water service "is being operated in the interest of the public and is of advantage to the convenience and commerce of the people, and that such extension will neither exclude, prevent, nor reduce competition on the route by water under consideration."[3] The rail carrier petitioned the Commission for such extension of time and for a hearing as to whether its ownership of a boat line

[3] See *Lehigh Valley R. Co.* v. *U. S.*, 234 F. 682, 684, 698, for discussion of this clause.

was in violation of the statute. The Commission, after hearing, decided that the railroad did or might compete with its boat line and ordered the petition dismissed. An injunction against that order was sought under the Urgent Deficiencies Act. The lower court dismissed the bill on the merits. On appeal to this Court, the decree was affirmed, but upon jurisdictional grounds as follows (414):

> We assume that the question whether the facts found by the Commission present a case of real or possible competition within the meaning of the statute is a question of law that could not be conclusively answered by the Commission; but still there is nothing for a court of equity to enjoin if all that the Commission has done is to decline to extend the time during which the railroad can keep its boat line without risk.
>
> The order of the Commission was negative in substance as well as in form. *Procter & Gamble Co.* v. *United States,* 225 U. S. 282, 292, 293. The risk to which the railroad was left subject did not come from the order but from the above-mentioned section of the Panama Canal Act (amending section 5 of the Act to Regulate Commerce) making each day of violation a separate offence and the provision of the latter act, section 10, which imposes a possibly large fine. This risk is the same that it was before the order or that it would have been if appellant had not applied to the Commission except so far as the

findings establish facts that we believe there is no desire to dispute. Without going further it appears to us plain that the decree of the District Court dismissing the bill was right.

It will be noted that the above case, like the case under consideration, involved an application to the Commission for permission to do something which the statute forbade without Commission authority, and also, as in the instant case, there was the legal question as to whether the precise situation did fall within the basic prohibition of the Act. If it did not, Commission authority was unnecessary, for then continued ownership of the boat line would not have been a violation of the statute.

But regardless of whether or not Commission authority was necessary, if the Commission had granted its permission, the railroad could have continued its ownership of the boat line without risk of statutory penalties. Similarly in the instant case, if the Commission had granted the application, the Piedmont & Northern could have undertaken the new construction without subjecting itself to statutory penalties. However, in both cases the Commission's orders denied the relief asked, leaving the carriers confronted with possible statutory penalties if they should proceed without Commission authority. Still the risk to which the carriers were left subject did not come from the negative orders but from the statutes, in the one case depending upon whether the ownership by the rail carrier

of its boat line did, as a matter of law, violate the basic prohibition in the Act, and in the other case depending upon whether the Piedmont & Northern is, as a matter of law, the kind of rail carrier which the statute forbids to undertake extensions of its line without Commission authority. In both cases a final judicial determination of the aforesaid questions of law favorable to the contentions of the carriers would have permitted the carriers to proceed without liability to punishment or penalties, regardless of the views of the Commission upon those legal questions. But, since orders which merely deny the relief prayed for, thereby leaving the existing status unchanged, present nothing to be enjoined, they afford no basis for suits wherein such judicial determination may be properly invoked. In the instant case as in the *Lehigh Valley case*, the risk to which the railroad is left subject comes, not from the order, but from the statute and is the same that it was before the order or that it would have been if the Piedmont & Northern had not applied to the Commission.

If it should be contended that, despite the fact that the Commission's order is negative, its conclusion, that the Piedmont & Northern is included among the carriers which must secure Commission authority before extending their lines, clouds the rights of the Piedmont & Northern and upon such grounds may be enjoined, that would appear to be met by the *Los Angeles Valuation case*, 273 U. S.

299, 314, wherein this Court said in respect of a somewhat similar contention that neither the Commission's "utterances nor its processes of reasoning, as distinguished from its acts, are a subject for injunction." The action of the Commission was negative and, therefore, all that is left is its expression of views that its authority does extend to the construction of lines proposed by the Piedmont & Northern.

ARGUMENT ON MERITS

The Commission's authority under Section 1 (18) to (21) of the Interstate Commerce Act is a prerequisite to the extension or construction of lines proposed by the Piedmont & Northern

THE PIEDMONT & NORTHERN'S PROPOSED LINES ARE NOT SUCH AS FALL WITHIN THE MEANING OF THE EXCEPTION CONTAINED IN SECTION 1 (22), EXCLUDING FROM COMMISSION AUTHORITY THE CONSTRUCTION OF STREET, SUBURBAN, OR INTERURBAN ELECTRIC RAILWAYS, WHICH ARE NOT OPERATED AS A PART OR PARTS OF A GENERAL STEAM RAILROAD SYSTEM OF TRANSPORTATION

Paragraph (18) of section 1 provides that "no carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad * * * unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience require or will require" the same. Paragraph (22) of section 1 provides that the authority so conferred upon the Commission

> shall not extend to the construction * * * of spur, industrial, team, switch-

> ing or side tracks, located or to be located wholly within one state, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation.

The Piedmont & Northern, although claiming that it is an interurban electric railway not subject to section 1 (18) of the Act, nevertheless admits that it is a common carrier by railroad generally subject to the Act. (R. 2.)

The Piedmont & Northern is just as much an ordinary railroad as if it had heretofore been operating by steam power in interstate commerce and had only now decided to operate with electric locomotives. The construction of its road is admittedly that of a steam railway, except in respect of power transmission. (R. 39, 138, 144.) Most of its freight is handled in cars owned by steam railroads, and petitioner itself owns 165 automobile cars and 99 other box cars, all of which are of ordinary steam-railway type and move freely on foreign roads. (R. 38, 153, 148.) Between terminals it operates over private right of way and the proposed new lines would provide independent through track to move freight around the cities. (R. 37, 140.) Only 2.9 miles of the main-line mileage is in streets. (R. 37.) Freight trains are hauled by locomotives weighing from 55 to 95 tons each, rated to haul from 800 to 1,200 tons. (R. 37.)

The Piedmont & Northern belongs to the Per Diem Association, the American Railway Association, the Southern Freight Association, the Southern Weighing and Inspection Bureau, and Southeastern Demurrage Association. Its traffic manager stated that he did not know of any other electric interurban railroads that belong to those associations. (R. 153.) It is a party to the American Railway Express Company Uniform Express Contract. It is a party to the tariffs of steam railroads and follows their methods in matters of divisions of joint rates, interline billing, claim settlements, and all of its relations with shippers. (R. 165.) It has an extensive traffic organization and is represented by powers of attorney in nearly every traffic bureau of the United States. It has 502 published tariffs and in 1926 initiated 42 changes in rates to distant points. (R. 183, 38.)

In *Kirkpatrick* v. *Piedmont Traction Co.,* 170 N. C. 477, there was involved a suit by an abutting property owner against the Piedmont Traction Company (predecessor in ownership of the North Carolina segment of appellant's line) to recover damages for the laying of track and its operation on the highway adjacent to his property on the theory that it constituted an additional burden on the fee. It appears from the decision that the usual street railway does not, under the laws of North Carolina, subject adjacent property to an additional servitude. The court held that the Piedmont &

Northern's operations were of such character that they did constitute an additional servitude, remarking as follows:

> We are of opinion that, from the nature and description of the defendant's business as given in the record, and the manner in which it operates its freight trains and interurban passenger trains, it should be classed as a "steam railway" and can not be regarded as the ordinary street railway. The matter is not to be determined by the character of the motive power, but rather by the character of the business done, as well as the injury inflicted by it.

This view of the North Carolina Court appears to be borne out by what was said by a former president of the Piedmont & Northern, Mr. Taylor, in argument before the Commission in *South Carolina Fares and Charges,* 60 I. C. C. 290, which case involved an application by the steam roads operating in South Carolina and the Piedmont & Northern for increased intrastate fares and line haul switching charges to conform to the interstate basis that had been prescribed in *Increased Rates, 1920,* 58 I. C. C. 220. Mr. Taylor's argument was made an exhibit in the Commission proceeding herein involved (R. 143) and among other things he said:

> If the Commission please, in my opinion there would be every reason in the world, and certainly the same reasons for excluding in any raise the electrically operated portion of the Chicago, Milwaukee & St.

> Paul, as there would be for excluding us. The same reasoning would apply to the Norfolk & Western, the undisputed and indisputable fact being that we are a railroad competing for interstate business, 65 per cent of our revenue being derived therefrom. We are a class one railroad, under your definition of the classification of railroads, and the only difference between us and any steam railroad operating in this country is the fact that we employ an electric locomotive, which the steam railroads some day must come to, instead of a steam locomotive. (R. 146.)

It is true that the Piedmont & Northern, although the volume of its business entitles it to a Class 1 rating and the bulk of that business is interchanged with the steam roads, is not operated as a part of a general steam system to the extent of being owned and managed by a steam railroad. It is also true that its motive power is furnished by electric locomotives. And, further, its operations are interurban in the sense of being conducted between cities. Similarly, if the word "interurban" carries with it no other meaning than "between cities," the operations of the great trunk lines of the country are likewise interurban, which would compel the strained construction that Congress, in excluding interurban electric railways from Commission authority, intended that the distinction between them and the steam roads should depend solely upon the character of the motive power. This can hardly

have been Congress' intention. The obvious purpose, shown not only by the association of the term "interurban" electric railway with street and suburban electric railways but also by the very fact that the whole of paragraph (22), wherein it is contained, constitutes an exception from Federal authority in favor of local authority, is that the term should signify railways whose operations are distinctively local and characterized by the predominance of passenger traffic at least. Measured by such standard the Piedmont & Northern's operations fall far outside the scope of the term "interurban electric railway."

The opinion of the lower court contains a very comprehensive statement of the local operations upon which the Piedmont & Northern relies to distinguish it from the ordinary steam road (R. 233–235), from which the following excerpts are taken:

> The existing lines of the Piedmont and Northern have connections with the street railway systems of the cities which it serves, acquired either by direct ownership or by contracts for trackage rights. Thereby its passenger cars within the cities en route become street railway facilities. Between the cities there are frequent stops for passengers at an average distance of 1.2 miles apart—that is to say, 106 stops in 128 miles of road. Forty-nine passenger trains daily traverse various parts of the line. There are more daily trains and more frequent stops than on the corresponding mileage of the Southern

Railway. Furthermore the spacing between the trains is more uniform. The passenger cars are motivated by self-contained motor units, and are lighted from a trolley. By reason of their equipment, they are not unacceptable upon steam lines.

* * * * *

* * * The difference between the local freight service of the Piedmont and Northern and that of the steam railroads consists chiefly in the use of the street-railway systems to gather up and deliver freight in the cities, the greater number of local freight stations on its lines between cities, the operation of its freight trains in smaller units and with greater frequency, and of a speedier delivery of local freight between near-by points.

The local passenger and local freight business thus described give to the road the peculiar features upon which the petitioner relies to distinguish it from the ordinary steam railroad. But this business constitutes only a small part of the petitioner's operations. Far greater is its general freight business, made possible by interchange relations with steam trunk lines in the south through which it is connected for the receipt and delivery of property with vast sections of the United States.

That the Piedmont & Northern's passenger and local freight service constitutes an insignificant part of its operations is strikingly borne out by the

evidence. 92 per cent of its revenue is derived from freight (R. 140, 147), 95 per cent whereof is carload traffic (R. 190), moving in trains of from 20 to 45 cars (R. 37). It is safe to say that such operations do not fall within the common acceptation of what constitutes interurban electric railway service. The bulk of the Piedmont & Northern's freight is interchanged with the steam roads. Of 72,886 cars handled in 1926, 68,370 cars were so interchanged (R. 37, 153, 147) and, with the proposed lines built, the carrier estimates it will handle 85,000 additional cars in interchange (R. 147). One of the main purposes of the proposed construction is to make of the Piedmont & Northern a link with the steam roads in a new through route for the movement of freight between the North, East and West and Florida points. (R. 10, 39, 56, 157, 162, 228.) It estimates that its increased revenue for the first year would be $3,890,016.57, (R. 141) an increase of $1,372,654.91 over 1926, (R. 37, 90) and that for the succeeding 5 years it would increase each year 8.4 per cent over the preceding year (R. 141). The carrier further estimates that of said total revenue of $3,890,016.57 for the first year, only $196,502 would be derived from passenger traffic as against $3,597,384 derived from freight,[4] and that all but 21 per cent of said freight would be interchanged with the steam roads. (R. 66.)

[4] The estimate also includes: Express revenue, $70,261, and miscellaneous, $25,870. (R. 66.)

The Piedmont & Northern Railroad, completed as proposed, would closely parallel existing railroads throughout its entire length and would touch no local point of importance not served by existing lines (R. 41, 52, 54, 74), and it seems that its expected increase in revenues would be mainly obtained at the expense of those other railroads now serving the locality (R. 166, 169), whose capacity, it was testified, was not only adequate but vastly in excess of present transportation needs (R. 42, 44).

a. The words "interurban electric railway" have no settled meaning at law and therefore resort must be had to the context of the statute to insure correct interpretation

The Piedmont & Northern's existing lines are, and its proposed lines would be, operated between cities with electric locomotives, but those facts are by no means sufficient to constitute the proposed construction that of an "interurban electric railway" within the meaning of the exception to the Commission's authority over new construction contained in paragraph (22) of section 1. The fact that the railroad is, and will continue to be, interurban does not distinguish it from ordinary railroads since the latter are likewise universally operated between cities and towns. The fact that, in addition, it will continue to employ electric locomotives still leaves the distinction indefinite, for certainly it will not be urged that the complete electrification of any one of the big trunk lines systems would remove it from the Commission's authority

under section 1 (18). The outstanding deductions that may be made from the courts' decisions differentiating particular electric railways from the "carrier by railroad" subject to the Act are: (1) That resort should be had to the context of the Act to determine whether the particular road's operations are of a kind intended to be subject to the regulatory authority, and (2) that the distinguishing characteristic of such electric railways as are not to be regarded as ordinary railroads, is the essentially local character of their operations, rendering them unfitted for doing the acts and committing the mischief intended to be regulated.

In *Omaha Street Ry.* v. *Int. Com. Com'n.,* 230 U. S. 324, the Court, in holding that an electrical railway operating in the streets of Omaha and Council Bluffs and also interstate between those cities was not a railroad within the meaning of that term as used in the Act, and that its interstate fares were not, therefore, subject to Federal regulation, was constrained to resort to the context of the Act to determine whether the purposes sought to be attained fitted in with the operations of the particular railroad. After commenting upon the conflict in the decisions of the state and Federal tribunals upon the subject, it was said at page 335:

> But all the decisions hold that the meaning of the word is to be determined by construing the statute as a whole.

And again at page 337:

> Street railroads not being guilty of the mischief sought to be corrected, the remedial provisions of the statute not being applicable to them, commands upon every railroad "subject to the act" being such that they could not be obeyed by street railroads be cause of the nature of their business and character and location of their tracks, it is evident that the case is within that large line of authorities which hold that under such a statute the word "railroad" can not be construed to include street railroad.

And still again, in distinguishing this road, which was interurban in that it operated between Omaha and Council Bluffs, from electric interurbans whose operations have a broader scope the Court said, at pages 337–338:

> But it affirmatively appears that the company was chartered as a street railroad, and hauls no freight and is doing only a business appropriate to a street railroad. So that whatever the motive power or the size or speed of the cars is immaterial. In any event, there were "street cars" referred to in the act of Congress authorizing the construction of the Bridge from Council Bluffs to Omaha. (24 Stat. 501.) The company used such cars and did a street passenger business only. It laid its tracks in crowded thoroughfares of those cities and their suburbs and it is manifest that Congress did not intend that these tracks should be connected with Railroads

for hauling freight cars and long trains through and along the streets of Omaha and Council Bluffs.

In *U. S.* v. *Village of Hubbard,* 266 U. S. 474, the court reached the opposite conclusion as to another electrical interurban railway, namely, that it was a railroad under the Act subject to provisions forbidding the charging of fares that discriminate against interstate commerce. This decision rests mainly upon the grounds that since Congress, in conferring new powers upon the Commission in 1920, expressly excepted certain independently operated electric railways from some of the new powers so conferred, it thereby indicated that it "did not intend to deny to the Commission the power to regulate interurban railways in other respects." But this holding does not carry with it, as claimed by appellant, the further holding that all independent railroads operating between cities and using electric locomotives are interurban electric railways within the meaning of the excepting clauses referred to. As above shown, the excepting clause contained in section 1 (22), herein under consideration, excludes from Commission authority over new construction street, suburban, or interurban electric railways not operated as parts of a general steam railroad system. Similarly Section 20a, concerning the issue of new securities, excludes "a street, suburban, or interurban electric railway

which is not operated as part of a general steam railroad system of transportation."

Certainly it could not have been within the contemplation of Congress that, if a class I railroad, or any other operating between cities, should substitute electric for steam locomotives, thereafter it would not have to come to the Commission for authority to undertake new construction or to issue new securities. In this connection, too, the settled rule of this Court should be kept in mind that excepting clauses to remedial statutes should be narrowly construed so as not to defeat the remedial processes intended to be accomplished. *Spokane & Inland R. R.* v. *United States*, 241 U. S. 344, 350.

Other notable decisions, wherein the Court has considered that, in determining the applicability of particular statutes to the operations of electric interurbans the safest guide was afforded by the context of the Act are: *Spokane & Inland R. R.* v. *United States, supra* (Safety Appliance Act); *Kansas City* v. *McAdow*, 240 U. S. 51, and *Spokane & Inland R. R.* v. *Campbell*, 241 U. S. 497 (Employers' Liability Act).

Also it is not out of place here to mention that in *Texas & Pacific Ry.* v. *Gulf, etc. Ry.*, 270 U. S. 266, involving the question as to whether a proposed track was an industrial track of a kind expressly excepted from Commission authority by paragraph (22) of section 1 (the paragraph here under consideration) the Court said at page 277:

A truer guide to the meaning of the terms extension and industrial track, as used in paragraphs 18 to 22, is furnished by the context and by the relation of the specific provisions here in question to the railroad policy introduced by Transportation Act, 1920.

(b) Under the terms of section 15a the Commission must include the Piedmont & Northern with the steam roads when adjusting rates so as to yield a fair return on aggregate group property value

Excepting clauses in respect of street, suburban, and interurban electric railways appear in two other sections of the Act as well as in Section 1 (22). As above said, the exception in section 20a, concerning the issue of new securities, is practically identical with that in section 1 (22), herein involved, in that it excludes from Commission authority "a street, suburban, or interurban electric railway which is not operated as a part of a general steam railroad system of transportation." Section 15a, which directs the Commission to adjust rates so as to yield a fair return upon the value of the properties of the carriers as a whole, or as a whole in rate groups, and which provides for the recapture of excess income from carriers earning more than such fair returns, excepts from its operation "(b) street or suburban electric railways unless operated as a part of a general steam railroad system of transportation, (c) interurban electric railways unless operated as a part of a general steam railroad system of

transportation or engaged in the general transportation of freight."[*]

The provisions with which we are here concerned and the above-mentioned sections 20a and 15a were added by the Transportation Act, 1920. Also in the latter Act, section 209, concerning the guaranty to carriers after the termination of federal control, excludes by paragraph (a) "a street or interurban electric railway, not under Federal control at the time Federal control terminates, which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic or sale of power," etc., and Section 300, which deals with the Labor Board, excludes by paragraph 1 "any street, interurban, or suburban electric railway unless such a railway is operating as a part of a general steam railroad system of transportation. * * *" The two latter sections constitute no part of the Interstate Commerce Act. But reverting to sections 20a and 15a we find that the excepting clause in the former is worded substantially the same as that contained in the paragraph herein particularly involved, but that the excepting clause of the latter excludes "interurban electric railways unless oper-

[*] Section 15(3) excepts from the Commission's authority to establish through routes and joint rates those "between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character. (36 Stat. 539, 551, 552.)

ated as a part of a general steam railroad system of transportation *or engaged in the general transportation of freight.*"

Since 92 per cent of the Piedmont & Northern's revenues are derived from freight and the record and report convincingly show in many other ways the very minor importance of its passenger traffic, it is clear beyond question that it is not excluded from section 15a, but is, on the contrary, among the railroads enjoying the benefits of the revenue-producing provisions of that section. The Piedmont & Northern's representations that the Commission has informally ruled that it was not subject to section 20a and has not as yet treated it as subject to the valuation provisions of the Act are of course irrelevant. *Virginian Ry.* v. *U. S.*, 272 U. S. 658, 663. This is the first time that the nature of its operations have been fully considered by the Commission in a formal proceeding. And, moreover, since the Piedmont & Northern is among those carriers entitled under section 15a to a fair return upon property value it seems clear that it is subject to the valuation provisions of the Act, since section 15a (4) provides that, whenever a carrier's valuation has been determined under said provisions, it shall be deemed to be the value thereof for the purpose of determining aggregate value under said section 15a.

(c) The provisions of section 1 (18)–(22), herein involved are particularly essential to the plan of Congress set up by section 15a and other amendments in that they place restrictions upon competitive and unneeded new construction thereby preventing extravagant increase of the aggregate property value upon which rates paid by the public are to be based

The fact that there can be no question but that petitioner is subject to section 15a is a particularly important consideration in this controversy, for section 15a and the provisions here under consideration are both essential cogs in the machinery set up by the Transportation Act, 1920, with one great objective in view.

This Court has frequently had occasion to pass upon the changes made in the Interstate Commerce Act by the Transportation Act, 1920, and has directed attention to the fact that those amendments are interrelated parts of a whole scheme to attain a particular purpose. Broadly speaking, that purpose was to secure for the country as a whole an effective transportation service at lowest possible just rates. This result was to be reached in part by direct instructions to the Commission to fix rates that, as aforesaid, will yield the carriers as a whole revenue adequate for an effective transportation service plus a fair return. (Sec. 15a, (2).) But rates adequate for the carriers as a whole (average rates) would yield the strong carriers more than a just return, whereas under such rates, the weak carriers, in many instances, might not earn their operating expenses. The Act meets this contingency by provisions intended to bring about a dis-

tribution of earnings derived from the average rates as fixed, more nearly commensurate with the needs of the individual carriers. In part this is to be effected by the recapture of excess income from the strong carriers and the making of the fund available for use by the weak carriers (Sect. 15a (6); *Dayton-Goose Creek Ry.* v. *U. S.*, 263 U. S. 456) and in part through the Commission's authority to fix divisions of joint rates so as to give especial consideration to the needs of weak carriers. Sect. 15 (6); *New England Divisions Case,* 261 U. S. 184, 191. However, an effective transportation service, in the sense of transportation furnished at reasonable rates to shippers, could not be secured by provisions looking merely to adequate rates and a proper distribution of the revenues derived therefrom, without, in addition, having regard for economies in operation. It will be readily seen that a direction to the Commission to adjust interstate rates so as to yield a fair return on property value, would, unless hedged about with economical safeguards, not only lead to careless management and the charging of inequitably low intrastate rates but would also be an incentive to wasteful construction of unnecessary duplicating lines.

The Act does not contemplate the securing of an effective transportation service at any such cost, namely, by merely skyrocketing rates, but rather plans for the ultimate lowering of rates. The carriers are assured of a fair return only under honest,

efficient and economical operation. (Sect. 15 (a) (2).) Intrastate rates may not be fixed so low as to constitute a burden on interstate commerce. (Sect. 13 (4); *Wisconsin R. R. Comm.* v. *C. B. & Q. R. Co.*, 257 U. S. 563, 585.) And finally, as a corollary to the assurance given of rates that will yield a fair return, Congress has enacted provisions looking to economies to be effected by the closer cooperation of the carriers in rendering a more unified general transportation service. It will have been noted that the efficient and economical operations, which are a prerequisite under section 15a (2) to the fair return provided for, are the operations of the carriers as a whole, or as a whole in rate groups. Economical operation of the carriers as a whole can not exist where unrestricted competitive duplications of service are permitted and, accordingly, Congress enacted provisions intended to make unnecessary the wasteful duplication of facilities, such, for example, as the provisions looking to the common use of terminals and tracks. (Sect. 3 (4); *R. R. Comm.* v. *Southern Pacific Co.*, 264 U. S. 331) and the provisions enlarging the Commission's authority to require the carriers to join in the making of through routes and the establishing of joint rates. (Sect. 15, (1) to (6).) Congress at the same time placed direct restrictions upon duplication of plant by requiring the carriers to secure the Commission's authority before issuing new securities (Sect. 20a (1)–(11)) and before undertaking

new construction or extension of lines. (Sect. 1, (18)–(22).) The latter are the provisions, above quoted, with which we are directly concerned here.

This plan of Congress is made very clear in *Wisconsin R. R. Com.* v. *C. B. & Q. R. Co.,* 257 U. S. 563; *Dayton-Goose Creek Case,* 263 U. S. 456; *New England Division Case,* 261 U. S. 184; *Texas & Pac. Ry. Co.* v. *Gulf, Colo. & Santa Fe,* 270 U. S. 266, and *Texas* v. *Eastern Texas R. Co.,* 258 U. S. 204. That the securing of economies in operation through a better coordination of the services of the many carriers is essential to the general plan is shown in the *Texas & Pacific case* and the *New England Divisions case* at page 190, footnote 7. That the particular provisions herein involved, namely, those requiring the Commission's authority for the construction of new lines, are part and parcel of that plan is shown in the *Texas and Pacific case,* the *Wisconsin decision* at p. 585, and in the *Dayton-Goose Creek case* at page 478. In the first case, namely, *Texas & Pac. Ry. Co.* v. *Gulf, etc., Ry.,* 270 U. S. 266, an injunction was sought to prevent a railroad from building a new line without the authority of the Commission. The suit was defended on the ground that what was proposed to be constructed was a spur track expressly excepted by paragraph (22) from the requirement that the Commission's authority be first had and obtained. The contention was there the same as made here, namely, that the extension was of a class excepted

from the Commission's authority by said paragraph (22). The court considered that the best guide as to whether the proposed line was an extension or was within the excepted classes was furnished by giving consideration to the purpose served by the particular provision in the general scheme of regulation inaugurated by the Transportation Act. At page 277 the opinion reads:

> A truer guide to the meaning of the terms extension and industrial track, as used in paragraphs 18 to 22, is furnished by the context and by the relation of the specific provisions here in question to the railroad policy introduced by Transportation Act, 1920. By that measure, Congress undertook to develop and maintain, for the people of the United States, an adequate railway system. It recognized that preservation of the earning capacity, and conservation of the financial resources, of individual carriers is a matter of national concern; that the property employed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public; that competition between carriers may result in harm to the public as well as in benefit; and that when a railroad inflicts injury upon its rival, it may may the public which ultimately bears the loss. See *Railroad Commission* v. *Chicago, Burlington & Quincy R. R. Co.,* 257 U. S. 563; *The New England Divisions Case,* 261 U. S. 184; *The*

Chicago Junction Case, 264 U. S. 258; *Railroad Commission* v. *Southern Pacific Co.,* 264 U. S. 331. The Act sought, among other things, to avert such losses.

(d) The difference in language between the exception in Section 1 (22) and the exception in Section 15a, whereby an electric interurban engaged in the general transportation of freight is expressly kept within the operation of the former but not mentioned in the latter, can not be ignored, but neither can it be given such broad scope as to exclude an electric road which is a real link with the steam roads in the country's general transportation system without seriously frustrating the remedial processes of the Transportation Act, 1920

The above review, then, shows that the prevention of wasteful duplication of lines was an essential part of the scheme of the Transportation Act to promote an effective transportation service at lowest possible rates.

Unquestionably some weight must be given to the difference in language of the excepting clause of section 15a and that of section 1 (22), herein under consideration, namely, to the fact that, while under the express language of section 15a an electric interurban is not excluded if it is engaged in general transportation of freight, such a carrier is not mentioned in section 1 (22). But it does not follow that the force to be given the difference in language should be of unlimited scope. The reason for the difference in language seems very clear. While an electric interurban, which has, in connection with its local business, built up a considerable interstate freight business, should for the sake of uniformity in rates, be included in the general rate

adjustments provided for in section 15a, still if its principal business continued to be the purely local carriage of passengers and small freight, the extension of its lines and facilities for such purposes likewise remained matters chiefly of local concern and should be left to local authority. But where, as here, the physical railroad, as linked up by the proposed extensions, will cross state lines and where, as here, the usual electric interurban passenger business is inconsequential, the exclusively local passenger and freight business is a small proportion of the whole and the avowed purpose of the extension of lines is to assure petitioner of a strong position as a participant in through traffic with large trunk-line railroads, the local interest in the new extensions certainly does not measure up to the federal interest in what, as said by the lower court, "would constitute the interior connecting link in a new joint through route and in effect" create "a new trunk line * * * in addition to those now provided by the Southern, the Seaboard, and the Atlantic Coast Line." (R. 238.)

In *R. R. Com'n. of Calif.* v. *Southern Pacific,* 264 U. S. 231, there was involved the question as to whether Commission authority under these very paragraphs (18)–(22) of section 1 was necessary for the rearrangement of track necessary in connection with the installation of a new union station, which had been ordered by the State Commission. While the Court conceded that state authority

might be exercised to require construction of a small local union station not involving changes in main track or substantial capital outlay, it then went on to say, at page 346:

> But there is a great difference between such relocation of tracks or local union stations and what is proposed here. The differences are more than that of mere degree; they and their consequences are so marked as to constitute a change in kind. They come within paragraphs 18 to 21 of section 402 and require a certificate of the Interstate Commerce Commission as a condition precedent to the validity of any action by the carriers or of any order by the State Commission.

Since in the instant case the issue is likewise as to whether the new construction is of a kind to which federal authority attaches or whether of a kind intended to be left to local authority, the above recognition by the Court that the nature of new construction and its consequences may constitute a change in kind, rather than in degree, seems particularly pertinent. While in the beginning the Piedmont & Northern's operations may have been principally of local interurban character, its revenues are now 92 per cent derived from freight, 95 per cent carload traffic and mostly interchanged with the steam roads. Its proposed construction would make of it a still more important link in the national transportation system.

To attribute full scope to the difference in language between the exception in section 15a and the

exception in section 1(22) seems impossible. Assume that a large trunk-line railroad should completely electrify its lines, it would then, in a broad sense, be an electric interurban railway, but still, because it is engaged in the general transportation of freight, it would be a carrier within the definition of section 15a whose property value is to be included with that of the other carriers of its rate group as a basis for rates that will yield a fair return. And yet, merely because the electric interurbans, excepted from the Commission's authority over new construction, are not in express words confined to those not engaged in freight transportation, it could, if unlimited scope is given the difference in language, duplicate the existing lines of competitors and extravagantly swell the aggregate property value of the rate group upon which the public is to pay rates that will yield a fair return.

Likewise, since the language of the excepting clause in section 20a is the same as that contained in the exception to the Commission's authority over new construction, such trunk line, or those in control of its stock, could issue new securities at will, thereby bringing back the conditions which induced Congress to clothe the Commission with authority over the issuance of new securities by the carriers.

This is entirely contrary to the well thought out and coordinated plan of the Transportation Act to provide an effective transportation service at lowest possible just rates. It gives too much weight to

the absence of language limiting the excepted electric interurbans to those not engaged in freight transportation and too little weight to the fact that, as aforesaid, the words electric interurban railways have themselves no settled meaning at law, definitely distinguishing them from ordinary railroads subject to the Act.

In *Spokane & Inland R. R.* v. *United States*, 241 U. S. 344, the question was involved as to whether the clause in the Safety Appliance Act excepting from its operation cars used upon street railways rendered that Act inapplicable to cars of an electric interurban which were both in street railway and interstate business. The Court held that the primary provisions of the Act were applicable, stating at page 350:

> We say this because while it is conceded that the obvious purpose of Congress in enacting the law and its amendments was to secure the safety of railroad employees, and that the amendment of 1903 sought to enlarge and make that purpose more complete, yet it is insisted that the exception in the act should receive such a broad construction as would destroy the plain purpose which caused the act to be adopted. But to so treat the act would be in *plain disregard of the elementary rule requiring that exceptions from a general policy which a law embodies should be strictly construed, that is, should be so interpreted as not to destroy the remedial processes intended to be accomplished*

> *by the enactment.* That the meaning contended for would be in direct conflict with this rule would seem free from doubt, since the inevitable result of sustaining the contention would be to put it in the power of a railroad by operating a train for a trifling distance over tracks within the exception to thereby secure the right thereafter to operate such train over long distances without regard to compliance with the safeguards of the statute which otherwise would be controlling. (Italics ours.)

Similarly in the case at hand, if a broad construction rather than the narrow construction called for by the rule, should be given to the excepting clause of section 1 (22), which as said is the same as that in section 20a, a steam railroad could by electrifying its lines defeat the purpose of the Act.

As repeatedly said, it was not the purpose of Congress to promote an effective transportation service merely by enlarging the carrier's revenues through increased rates. When in Section 15a Congress directed the adjustment of rates that would yield a fair return on aggregate group property value, it intended to restrict at the same time the swelling of property values by unnecessary construction of new lines, and in other ways to do away with the economic waste attendant upon unrestricted competitive conditions. In *Texas & Pac. Ry. Co.* v. *Gulf, etc., Ry., supra*, the court said at page 278:

> But where the proposed trackage extends into territory not theretofore served by the carrier, and particularly where it extends into territory already served by another carrier, its purpose and effect are, under the new policy of Congress, of national concern. For invasion through new construction of territory adequately served by another carrier, like the establishment of excessively low rates in order to secure traffic enjoyed by another, may be inimical to the national interest.

This purpose to prevent the swelling of property values is evidenced not alone by provisions requiring the Commission's authority for new construction but also by the provisions placing restrictions upon the issuance of new securities. *R. R. Com'n of Calif. v. Southern Pacific*, 264 U. S. 331, 347. An analogous amendment, made at the same time, is that guarding against such lowering of local intrastate rates as would unfairly burden interstate commerce in making good the fair return on aggregate property value. (Section 13 (4).) *In Wisconsin R. R. Comm. v. C., B. & Q. R. R.*, 257 U. S. 563, wherein the Court supported the Commission in removing the burden cast upon interstate commerce by unreasonably low local rates, it was said at pages 587-589:

> Counsel for appellants are driven by the logic of their position to maintain that the valuation required for the purposes of section 15a to be ascertained pursuant to section

> 19a of the Interstate Commerce Act (37 Stat. 701; amended 41 Stat. 493), is to be only of that part of the property and equipment of the interstate carriers which is used in commerce among the States and must be segregated from that used in intrastate commerce. This is contrary to the construction which since the enactment of section 19a, March 1, 1913, the Commission has put upon that section in carrying out its injunction. It is inadmissible. The language of section 15a refutes such interpretation. The percentage is to be calculated on "the aggregate value of the railway property of such carriers held for and used in the service of transportation." To impose on the Commission the duty of separating property used in the two services when so much of it is used in both, and to do this in a reasonably short time for practical use, as contemplated by the statute, would be to assign it a well-nigh impossible task. This, of itself, prevents our giving the words such a construction unless they clearly require it. They certainly do not.

In connection with the above case it should be noted that not only street, suburban and interurban electric railways are excepted from the Commission's authority over new construction, but also intrastate steam carriers. This is apparent from the fact that section 1 (18) applies only to carriers subject to the Act and that section 1 (1) of the Act limits carriers subject to the Act to those engaged in interstate and foreign commerce. And yet it ap-

pears that the Commission has authority over the abandonment by an interstate steam road of a branch line wholly located in one State. In *Colorado* v. *United States*, 271 U. S. 153, the Court in upholding an order of the Commission authorizing, under this very paragraph (18) of section 1, the abandonment of lines located wholly within a State over the protest of the State, based its action on the same ground as is here urged in support of the Commission's order restricting unnecessary new construction. At page 163 the opinion reads:

> The sole objective of paragraphs 18–20 is the regulation of interstate commerce. * * * The exertion of the Federal power to prevent prejudice to interstate commerce so arising from the operation of a branch in intrastate commerce is similar to that exerted when a State establishes intrastate rates so low that intrastate traffic does not bear its fair share of the cost of the service, *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563; *Nashville, Chattanooga & St. Louis Ry.* v. *Tennessee*, 262 U. S. 318; or when the State authorities seek to compel the erection of a union station so expensive as unduly to deplete the financial resources of the carriers, *Railroad Commission* v. *Southern Pacific Co.*, 264 U. S. 331; or when one railroad seeks to construct an intrastate branch line, which will deplete its own financial resources or those of another interstate carrier, *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry. Co.*, 270 U. S. 266.

All of the contemporaneous amendments are interrelated parts of the whole plan of Congress. Each is necessary to ensure shippers that rates adjusted under section 15a to meet the proper needs of a growing commerce will not be unfairly placed nor based on the value of property extravagantly or speculatively constructed in excess of commercial needs. Unless those safeguards are to be given their intended effect shippers would be in a far better position if section 15a had never been enacted. What was said in the *Wisconsin Case, supra,* (p. 586) of the provision relating to burdensome intrastate rates is equally, if not more, applicable to the provisions intended to restrict unneeded new construction, namely, that "it is impossible to escape the dovetail relation between that provision and the purpose of section 15a."

In the instant case it is proposed to duplicate existing railroad lines. What is commonly understood as local electrical interurban service would be of minor importance and the chief purpose is to entrench the Piedmont & Northern in a strong position to compete with the steam roads. But the existing roads are shown to be adequate not only for present needs but for a vastly increased volume of traffic and, accordingly, the resulting increased group property value as a basis for rates would place an unnecessary burden upon interstate commerce and one entirely out of proportion to the possible improvement in local service.

Accordingly, since, as above shown, by far the greater part of the Piedmont & Northern's business is of steam-railway character and the purpose of the proposed extensions is primarily to enlarge, and to still further fortify its position in respect of business of that character, it is certain that the Piedmont & Northern is of the class of carrier fitted to commit the mischief which the statute is intended to prevent. This is the only reliable criterion available to determine whether it is among the carriers intended to be regulated or is within the class of carriers intended to be excepted from the statute. Moreover, the rule should be kept in mind that excepting clauses must be narrowly construed so as not to defeat the main objective of the statute (*Spokane & Inland Empire R. Co.* v. *U. S.*, above quoted from) and that in this case such main objective constitutes an important cog in the machinery set up by Congress to promote an effective general transportation service at lowest possible just rates.

(e) The plan of Congress for an effective general transportation system contemplates that its restrictive provisions as well as those conferring benefits should be uniformly applicable to all carriers constituting real links in the transportation chain

It has been shown that the Piedmont & Northern enjoys the advantages of the revenue producing provisions of the act (sec. 15a) and that its property value must therefore be included in aggregate property value upon which rates are based. It has also been shown that the main purpose of the proposed extensions of lines is to entrench the car-

rier more firmly as a link in the chain of the country's general transportation system, and in order to do so it must avail itself of the provisions of the act making it the duty of the carriers to afford reasonable and equitable facilities for interchange of traffic (sec. 3 (3)) and those provisions making it mandatory upon the Commission to establish through routes and joint rates whenever deemed desirable in the public interest.[6] It has been pointed out that one of the purposes of making through routes generally available to the carriers was to eliminate the incentive for the duplication of lines in competitive territory. It has also been pointed out that, while the proposed extensions of lines will go to swell the aggregate property value upon which rates to the public are based, they have been found by the Commission not to be needed in the public interest because existing lines afford ample transportation for existing commerce and its reasonably to be expected future growth. Accordingly, is it reasonable to suppose that Congress intended that such a carrier, participating substantially in the general transportation of commerce engaged in by the steam roads, should be permitted to avail itself of the advantages of certain of said interrelated provisions enacted by the Transportation Act while

[6] The Piedmont & Northern is enjoying all these benefits, including the Commission's protection against unduly low rates required by State authority. *South Carolina Fares and Charges*, 60 I. C. C. 290.

at the same time refusing to submit to the restrictive provisions to which other carriers are subject and which are essential for the welfare of the transportation system as a whole.

CONCLUSION

The decree of the court below dismissing the bill should be affirmed.

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